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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 258

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al.,

Appellants,

v.

FROZEN FOOD EXPRESS, et al.,

Appellees

APPELLANT RAILROADS' STATEMENT OF JURISDICTION

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IN THE

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OCTOBER TERM, 1956. No.

Akron, Canton and Youngstown Railroad Company, et al.,
Appellants,

v.

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Appellees.

APPELLANT RAILROADS' STATEMENT OF JURISDICTION.

In compliance with Rule 13, paragraph 2, of the Revised Rules of the Supreme Court of the United States, the Appellant Railroads, a list of which is attached and marked Appendix A, each of which was an intervening defendant below, most respectfully submit this their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause.

OPINION AND JUDGMENT BELOW.

The opinion of the United States District Court for the Southern District of Texas, Houston Division, which Court consisted of the Honorable J. C. Hutcheson, Chief Circuit Judge; the Honorable Ben C. Connally, District Judge; and the Honorable T. N. Kennerly, District Judge,

is reported under the name *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956). The final judgment of that Court was entered on March 14, 1957, a copy of which is attached and marked Appendix B. It should be noted at this point that this appeal is from only a portion of the judgment. It should also be noted that this appeal involves, to some extent at least, litigation previously before this Court, and therefore it deemed appropriate to invite attention to the following reported cases, all directly concerned with the question here the subject of review:

Frozen Food Express v. *United States*, 128 F. Supp. 374 (S. D. Texas, 1955);

Frozen Food Express v. *United States*, 351 U. S. 40 (1956);

East Texas Lines v. *Frozen Food Express*, 351 U. S. 49 (1956).

JURISDICTION.

(1)

The proceeding below had its beginning in an action to enjoin and set aside certain orders of the Interstate Commerce Commission pursuant to the requirements of 5 U. S. C. § 1009, 28 U. S. C. § 1336, 1398, 2321-2325, inc., and 49 U. S. C. § 305 (g), brought by the Appellee Frozen Food Express. That cause was heard by a District Court of three judges in accordance with the requirements of 28 U. S. C. § 2325. The Court, after considering the matter, concluded that the order of the Commission was not reviewable and ordered the action dismissed. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 379 (S. D. Texas, 1955). These Appellants and others appealed the order dismissing the action to this Court and thereafter this Court held, contrary to the District Court, that the

Commission's order was reviewable and ordered the District Court to adjudicate the merits. *Frozen Food Express* v. *United States*, 351 U. S. 40, 45 (1956). The three judge District Court thereafter heard arguments addressed to the merits of the Commission's order, and on December 31, 1956, issued an opinion in which it sustained to some extent, and enjoined to other extent, the Commission's order which was the subject of review. *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956). The determinations of the Court below were made effective by a judgment entered March 14, 1957. It is from a portion of this judgment that the instant appeal is taken. A Notice of Appeal from this judgment was filed by these Appellants in the United States District Court for the Southern District of Texas, Houston Division, on May 11, 1957.

(2)

Jurisdiction of a direct appeal from a three judge district court in matters of the type here involved is vested in the Supreme Court by statute, 28 U. S. C. §§ 1253 and 2101 (b).

(3)

Such jurisdiction of the Supreme Court is also made plain by *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956).

THE QUESTION RAISED ON APPEAL.

Whether the three judge district Court below was in error in interpreting the decisions of the Supreme Court of the United States in the cases of *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), and *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956), and thereby holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are "agricultural

commodities" as that term is used in Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. § 303 (b)(6), and, that therefore, these commodities may be moved over the highways in interstate commerce by motor carriers not holding a certificate or permit issued by the Commission?

STATEMENT OF THE CASE.

The matter now before this Court was first presented in a proceeding before the Interstate Commerce Commission, *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951). That proceeding involved an extremely important but very troublesome section of the Interstate Commerce Act, namely, Section 203 (b)(6), 49 U. S. C. § 303 (b)(6), which provides as follows:

> "Nothing in this part [*i.e.*, the provisions providing for economic regulation of the motor carrier industry] * * shall be construed to include * * motor vehicles used in carrying * * agricultural commodities (not including manufactured products thereof) * *."

Prior to the *Determination* case, and from the very inception of regulation of the interstate motor carrier industry in 1935, there had been considerable doubt and much confusion among those in the transportation industry as to where the line should be drawn in separating agricultural commodities that had been merely processed from those which had been manufactured, in determining whether such items had to be handled under regulation or could be transported over the highways outside of regulation. The language of the statute itself was not at all helpful in establishing this line, and the legislative history was little better. Left to their own devices, the carriers made such determinations largely upon the basis of what was individually thought beneficial without regard for the basic and over-all objectives of the statute and the regu-

latory scheme created by it. Attempts on the part of the Commission to classify particular items were on an isolated or fragmentary basis and, in the few instances where the courts became involved, the approach was substantially the same. Direction and a well defined course were entirely lacking and it is fair to say that the regulatory scheme was being seriously endangered by the flounderings that were taking place. It cannot be gainsaid that what was urgently needed was Commission action which would outline a pattern that could be easily followed and which would at the same time provide a sensible and workable solution so that the entire industry, within reasonable limits, would have clearly in mind what type of items were exempt and what type of items were required to be handled under regulation. Stated a little differently, what was needed was a Commission interpretation of the statute which would have every-day workability, as contrasted with legalistic and academic accuracy and precision.

In the *Determination* case it is apparent that the Commission's objective and purpose were to provide the transportation industry, shippers, and others vitally concerned with interstate commerce with just such an interpretation and application of the statute. A reading of the Commission's report will demonstrate that the method it followed was to review the legislative history of the section and the court decisions dealing with similar Congressional language. From this review it was concluded that the term "agricultural" ordinarily includes farming, horticulture, forestry, dairying, and live stock and poultry raising, and that the term when used in the Interstate Commerce Act should be given its ordinary meaning. Thus "agricultural commodities" as used in Section 203 (b)(6), the Commission said:

> "* * embraces all products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live

poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey)."[1]

Having found the scope of the commodities embraced within the term "agricultural commodities", the Commission next turned to the meaning of the term "(not including manufactured products thereof)" which is the statutory standard which determines whether the transportation is under regulation or outside of it. This term takes on importance when commodities, which in the first instance are admittedly agricultural commodities, are subjected to processing. In such situation the inquiry is whether the processing has converted the once agricultural commodity into a manufactured product. No deep or searching thinking is required to reach the conclusion that such an inquiry—with the myriad degrees of processing actually applied, or likely of application as new techniques are developed, to agricultural commodities—results in the finest shades of distinction and almost hopelessly confusing analogies. The line between merely processed and manufactured would seem to be as difficult to draw as the line between educated and uneducated.

Attempting to deal with this perplexing problem, the Commission looked to the decisions of this Court and concluded that an agricultural commodity becomes "manufactured" when, as a result "* * * of treating or processing, [it acquires] new forms, qualities, properties, or combinations",[2] and on the basis of this definition it then classified a number of processed agricultural commodities as either in the exempt classification of "agricultural commodities" or in the regulated classification of "manufactured products."[3]

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[1] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 519 (1951).

[2] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 521 (1951).

[3] *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 527-558 inc. (1951).

Frozen Food Express, a certificated motor carrier, handling some traffic of the type involved in the *Determination* case under regulation—but faced with competition from other motor carriers operating outside of regulation and handling as exempt particular commodities held by the Commission to be in the non-exempt category, under a claim that the Commission's interpretations were not proper—in order to test the legality of the Commission's classifications, brought suit in July of 1954 in the Southern District of Texas before the three judge Court below to enjoin the Commission from enforcing its order in the *Determination* case. These Appellant Railroads, the American Trucking Association Inc., and others in the transportation industry having an interest in preserving fair and equitable regulation intervened in support of the Commission's order. The Secretary of Agriculture and the Department of Justice also intervened but for the purpose of having the Commission's order set aside as it applied to particular processed items. After hearing argument and receiving briefs, the three judge Court concluded that the Commission's order was not reviewable and dismissed the suit. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 379 (S. D. Texas 1955).

In addition to seeking a review of the Commission's order in the *Determination* case, Frozen Food Express in the same proceeding asked the three judge Court to enjoin and set aside another order of the Interstate Commerce Commission which specifically directed Frozen Food Express to cease and desist from transporting fresh and frozen dressed poultry in interstate commerce until a certificate was secured.

The commodities embraced in the cease and desist order, namely fresh and frozen dressed poultry, had been placed in the manufactured category in the *Determination* case. The Court below granted the injunction. *Frozen Food Express* v. *United States*, 128 F. Supp. 374, 381

(S. D. Texas, 1955). These Appellant Railroads, the American Trucking Associations, Inc., interested certificated motor carriers, and the Commission appealed both orders of the three judge Court to this Court. Probable Jurisdiction was noted with respect to both orders of the lower Court. Thereafter this Court in separate opinions and orders, in one instance reversed and in the other instant affirmed the Court below. In *Frozen Food Express v. United States*, 351 U. S. 40 (1956), this Court with Mr. Justice Harlan dissenting, held that the Commission's order in the *Determination* case was reviewable and returned that case to the three judge Court below for review on the merits.

In *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), this Court in a five to four decision affirmed the lower Court's holding that the Commission had erred in concluding that fresh and frozen dressed poultry was not an agricultural commodity. Mr. Justice Douglas in stating the views of the majority said at Page 54:

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203 (b)(6)."

This language has given rise to much speculation within the transportation industry as to whether this Court has pronounced a new and different test from that adopted by the Commission for determining the point at which processing becomes manufacturing. Certainly in cases before three judge courts following the decision in the *East Texas Lines* case, there are strong indications that those courts have taken this language to prescribe a new test, one which is more liberal in favor of the exempt status than the Commission's.[4] The importance of this test will

[4] *See Consolidated Truck Service* v. *United States*, 144 F. Supp. 814, 817 (Dist. N. J. 1956); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599, 602 (W. D. Wash. 1956).

become evident after the proceedings in the Court below are examined.

After this Court had ordered the Commission's order in the *Determination* case to be reviewed on the merits, the case was again briefed and argued orally before the Court below. In both the briefs and the oral arguments, particular attention was given to the so-called "Continuing Substantial Identity Test" and its application to the many commodities, the status of which was before the Court.

The Court below in an opinion handed down on December 31, 1956, *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas, 1956), applying the continuing substantial identity test held the following commodities to be exempt (148 F. Supp. at page 402):

> "* * frozen whole eggs; dried egg powder, dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leaves."

The Court then went on and found the following commodities to be non-exempt saying (148 F. Supp., at page 403):

> "For the reasons set forth in our opinion Frozen Food Express *v.* U. S., 128 F. Supp. 374, at page 379

et seq., we hold to be non-exempt the following: slaughtered cattle; fresh meat; meat products. We likewise hold non-exempt, under the evidence, which deals with commercial creamery products, as 'manufactured products' of agricultural commodities, the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a 'manufactured product', it may well be that these items illustrate the point at which processing merges with manufacturing."

The holdings of the Court below that frozen fruits d vegetables are agricultural commodities were inenced to a considerable extent by a decision of a three lge court in *Home Transfer & Storage Co.* v. *United ates*, 141 F. Supp. 599 (W. D. Wash. 1956) aff. with-t opinion; *Interstate Commerce Commission* v. *Home ansfer & Storage Co.*, 352 U. S. 884 (1956), which was nded down after the opinion of this Court in *East xas Lines* v. *United States*, 351 U. S. 49 (1956).

In the instant appeal, these Appellant Railroads a e king this Court to review the holdings of the Court low to the effect that dried egg powder; dried egg yolks; lk, powdered; buttermilk; and fruits or vegetables uick frozen) are agricultural commodities within the eaning of that term as used in Section 203 (b)(6) of e Interstate Commerce Act. Each of these commodities, e Commission in the *Determination* case had earlier ld was *not* an agricultural commodity. The other hold-

ings of the Court below, regardless of whether they are in accord with those of the Commission in the *Determination* case, are not disputed before this Court by these Appellants.

The notice of appeal instituting this appeal was filed with the District Court below on May 11, 1957.

THE SUBSTANTIALITY OF THE QUESTION.

The agricultural production of this nation for the year 1954 furnished gross farm income of almost 34 billion dollars[5] and was a principal source of traffic for all forms of for-hire carriage. For the Class I Railroads which are parties in this litigation during this same year this tremendous agricultural production furnished freight revenues in excess of 1.4 billion dollars, or approximately 17.7 percent of their total freight revenues.[6] Thus, it can be seen that the transportation of agricultural production, whether unprocessed, processed, or manufactured is a commercial undertaking of gigantic size and of the greatest importance not only to the carriers, but to the shippers and consignees as well. And what is most important from the standpoint of the instant litigation is the growing trend on the part of the consumers to prefer agricultural items that have been extensively processed.[7] Since the consumers are evidencing a growing preference for processed agricultural items, it follows that the amount of such items that enter the stream of commerce is rapidly increasing. So, in this litigation, the concern is not only with traffic that is presently valuable to these Appellants, but also with traffic that in the future should be of increasing importance to them:

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[5] Agricultural Statistics, U. S. Dept. of Agriculture, 1955, p. 426.

[6] Transport Statistics for 1954—Interstate Commerce Commission, p. 41.

[7] Agricultural Statistics, U. S. Dept. of Agriculture, 1955, pp. 497, 250, 253.

The transportation by railroad of agricultural production regardless of whether such production is fresh, processed, or manufactured is subject to complete regulation, whereas the transportation of this segment of traffic by the railroads' competitors is free of all economic regulation unless the agricultural production is "manufactured". Since the railroads have had excessive difficulty in successfully competing for traffic which the motor carriers can handle outside of regulation, the interest of these Appellants in this litigation becomes clear. And particularly is this so when it appears that the determinations made by the Court below may have the effect of creating an exempt status for items of commerce which have long been regarded as properly moving over the highways only by regulated carriers. In summary, the question here involved is a most substantial one for if the decision of the Court below remains effective, the result will be to free from regulation for movement over the highways an important segment of traffic which until now has been regarded as traffic of the regulated carriers, and which when moved by railroads will remain under regulation. While it is true that to some extent this is an inequity inherent in the legislation, nevertheless, it is certainly a substantial matter if this inequity is improperly broadened by court determinations which are excessively generous in favoring the exempt status for commodities which have undergone considerable processing. It is respectfully submitted that with regard to the commodities here involved, namely, dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen), the decision of the Court below has extended the exemption far beyond what was contemplated by Congress largely because of a misunderstanding of the purport of the language of this Court in the *East Texas Lines* case.

This misunderstanding, these Appellant Railroads think, stems from a belief that this Court in utilizing the

continuing substantial identity test for determining the line between merely processed and "manufactured" was establishing a different and more liberal test in favor of exemption than the Commission adopted. The test the Commission used was that laid down by this Court in *Fruit Growers, Inc.* v. *Brogdex Co.*, 283 U. S. 1 (1931). There, Mr. Justice McReynolds relying on the definition in the Century Dictionary (283 U. S. 1, 11), held that manufacture exists where natural products by processing are given "new forms, qualities, properties, or combinations * *". In reaching this conclusion, this Court in the *Fruit Growers* case relied heavily upon its earlier language in *Hartranft* v. *Wiegmann*, 121 U. S. 609, 615 (1887), and *Anheuser-Busch Assn.* v. *United States*, 207 U. S. 556, 562 (1908).

That the continuing substantial identity test lately enunciated in the *East Texas Lines* case is a restatement of the same test announced in the *Fruit Growers* case is not only evident from comparison of the language used, the latter test being the corollary of the earlier one, but also from the fact that both were founded upon the earlier statements of this Court in the *Hartranft* and *Anheuser-Busch* cases. If this analysis is correct—and logic and reasoning strongly indicates that it is—the question in the Court below was not whether under a new test the involved commodities are manufactured, but rather whether the Commission with respect to the particular items here before this Court reached the proper conclusions by the application of the test it used.

The difficulty and uncertainty that must necessarily exist in applying any test to determine the fine line between merely processed and "manufactured" commodities is compounded and magnified out of all proportion when there is confusion and doubt as to the test that should be applied. If the transportation industry, particularly the regulated segments thereof, is to expand and improve its facilities for handling processed agricultural items which

ill necessitate vast expenditures of capital, there must be certainty within reasonable limits as to the test to be applied to determine whether a particular item moves under regulation or outside of it. Experience has demonstrated beyond all doubt that when it becomes established that a particular processed item once believed to be the subject of regulation is definitely placed in the exempt category, the transportation of such item in large measure is diverted from the regulated carriers. This being so, if uncertainty exists about the status of particular items, wise business judgment demands that the regulated carriers not waste their capital and energies in purchasing new equipment and developing new techniques for transporting a type of traffic that within the immediate future may be lost to them. Perhaps in an ideal business climate, it would be otherwise, but realistically, the state of affairs is precisely as here expressed. The result of this is that shippers and the nation as a whole must be satisfied with a transportation service which falls short of what it could be if reasonable certainty existed. Particularly is this so with respect to the transportation of frozen fruits and vegetables.

Since the decision of this Court in the *East Texas Lines* case, Section 203 (b)(6) of the Interstate Commerce Act has been the subject of litigation in four different three judge federal courts. In three of these cases, the issue involved the establishment of the line between processed and manufactured. *Frozen Food Express* v. *United States*, 148 F. Supp. 599 (S. D. Texas, 1956); *Consolidated Truck Service* v. *United States*, 144 F. Supp. 814 (Dist. N. J., 1956); *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W. D. Wash., 1956), aff. without opinion, sub nom. *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956). In the fourth case, this issue was not involved, the question being whether a substance found in the sub soil, namely peat moss is an agricultural commodity. *Premier Peat*

Moss Corp. v. United States, 147 F. Supp. 169 (S. D. N. Y., 1956).[8]

In each of the cases where the question involved manufacture, the courts applied the continuing substantial identity test to determine whether the particular commodities were manufactured, totally without regard to whether the Commission's conclusions based on the application of the test utilized by it were sound and correct. And from the language of the Court below, it appears quite evident that the Court believed that the continuing substantial identity test is a new, and inferentially a different, one. For example, the Court below refers to this test as "this most recent test" (148 F. Supp. 399, 402) indicating that it supersedes earlier versions. The disturbing and confusing impact of this is accentuated by the fact that the Court below in strong language concludes that the new test requires a liberal interpretation of the exemption. Thus, the Court below says:

> "In holding frozen fruits and vegetables to be exempt, the Home Transfer case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid ICC control in the carriage of these commodities."[9]

There is nothing in the opinion of this Court in the *East Texas Lines* case to support the conclusion that the continuing substantial identity test is either a new or a more liberal one in favor of exemption than that used by the Commission. At most, the *East Texas Lines* case stands for the proposition that this Court was convinced that the Commission had erred in concluding that by the application of the test it used, fresh and frozen dressed

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[8] This case is on appeal to the Supreme Court, *Baltimore & Ohio R. Co. v. Premier Peat Moss Corp.*, No. 1042, October Term, 1956.

[9] 148 F. Supp., 399, 402.

poultry were manufactured. The language of this Court establishes this. At page 54; Mr. Justice Douglas said:

> "The Commission is the expert in the field of transportation. And its judgment is entitled to great deference because of its familiarity in the industry which it regulates * *. But Congress has placed limits on its statutory powers; and our duty on judicial review is to determine those limits. * * Those limits would be passed here if the Commission were permitted to expand 'manufactured' to include such incidental processing as is involved in dressing and freezing a chicken."

This Court in the *East Texas Lines* case was not condemning the entire course of the Commission's reasoning which is so fully spelled out in the *Determination* case, but rather, it would appear, expressing the view that on the difficult question of the status of the particular border line commodities, namely fresh and frozen dressed poultry, the Commission had reached the wrong result. The five to four decision of this Court is an indication of this.

The Court below taking the language of this Court to create a new and more liberal test has not only completely disregarded the Commission's solution to the problem with respect to the particular items before this Court, but has also reached conclusions completely beyond the limits reasonably outlined by the *East Texas Lines* case.

In the proceedings leading to the Commission's order in the *Determination* case, a large number of scientists and others having broad knowledge of agriculture and the processing of agricultural commodities testified, as did representatives of many transportation companies. Others who did not testify submitted pleadings presenting their views, and there were unlimited opportunities for anyone to do likewise. Throughout the proceedings no one contended that any of the commodities here involved were in

the exempt category. All were in agreement that they are manufactured,[10] and the Commission by applying the test that manufacture exists where the items when processed take on new forms, properties or combinations, so concluded. It would seem applying the restated version of the test, namely that the exempt status is retained so long as continuing substantial identity remains, would also compel the conclusion that each of the items here involved is manufactured. Certainly, dried egg powder, dried egg yolks, powdered milk, buttermilk, through extensive processing have become as different from the products from which they are derived as any admittedly manufactured products are. If there is any doubt of this, it could be resolved by asking any of the millions of American soldiers and sailors who were subjected to powdered eggs and powdered milk during the last World War whether there is any similarity between those products and fresh eggs and milk. Were a restaurant to offer any of these items as a product having substantially the same identity as those from which they are derived, a customer's complaint of fraud would be more than justified and the restaurant's loss of patronage for deceit inevitable. If powdered milk and eggs are not manufactured, it tests imagination beyond limit to conceive of a manufactured food product.

Frozen fruits and vegetables are likewise something different from fresh fruits and vegetables. As the Commission stated (52 M. C. C. 511, 534):

> "Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain

[10] See *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511, 534, 547, 550 (1951). It is to be noted that while none of the parties contended that frozen fruits and vegetables were not manufactured, that Commissioner Lee alone was of the view that such frozen items were in the exempt category unless "substantially changed in character and appearance." 52 M. C. C. 511, 562.

questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or sirup. Since a 'combination' results, it follows in light of the foregoing definition of 'manufacture' that quick-frozen fruits are manufactured products. In the quick freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. In the circumstances, the frozen vegetables cannot be said to be in their natural state. We conclude that they, too, are manufactured products."

Frozen fruits and vegetables are as different from fresh as canned fruits and vegetables are, as everyone knows. But as to canned fruits and vegetables, the Court below said (148 F. Supp. 399, 403):

"We likewise hold non-exempt * * fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a 'manufactured product', it may well be that these items illustrate the point at which processing merges with manufacturing."

Essentially, both frozen fruits and vegetables and canned fruits and vegetables are preserved manufactured food products which result from agricultural commodities

having been: subjected to heat treatment; shelled, pitted or pared; divided or reduced in size; mixed with chemicals including salt, sugar, etc., and finally packaged and sold as different articles. Everyone would feel deceived and cheated if he were offered frozen strawberries or peaches as fresh, and equally so if offered frozen potatoes or luna beans as fresh. He would be just as indignant with such a substitution as he would be with canned fruits or vegetables for fresh.

The conclusion of the Court below that frozen fruits and vegetables are not manufactured—unlike its holding respecting buttermilk, powdered milk and powdered eggs—was not rested solely upon its application of the "new" continuing substantial identity test, for such conclusion was in accord with the opinion of the three judge court in *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp., 599 (W. D. Wash. 1956). But the decision there also was based on the feeling that the *East Texas Lines* case created a new test.[11]

It is the belief of these Appellant Railroads that the extremely liberal interpretations of the exemption contained in Section 203 (b)(6) of the Interstate Commerce Act that have resulted in such holdings as are here presented, namely that powdered eggs, powdered milk and frozen fruits and vegetables are not substantially different items than fresh eggs, milk, fruits and vegetables by reason of manufacture, indicate the urgent need for this Court to review the entire matter. Unless this is done, the path of liberal interpretation in favor of exemption will become so broad that it will destroy fair and sensible regulation of the motor carrier industry.

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[11] Some point may be made that the decision in the *Home Transfer* case was affirmed by this Court in *Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U. S. 884 (1956). While this may be technically true, such affirmance was without opinion and upon presentations made only in jurisdictional statements. The affirmance under such circumstances is, of course, regarded as no different from the denial of certiorari in a non-appeal case.

What is needed is a reconsideration of the test laid down in the *East Texas Lines* case in the light of the pattern of decisions of the lower courts applying it to determine whether the test ought to be redefined, or more definite directions given for its application. If this is not done, the erosion of regulation will continue until the line between agricultural commodities and manufactured products thereof will be totally obliterated. If this be the inevitable result of the trend of the lower courts' decisions based on the *East Texas Lines* case, and this Court does not deem it appropriate to divert the flow in this direction, then the regulated transportation industry is entitled to know this so that its future plans and policies can be plotted and mapped. Similarly, if this Court has envisioned the trend of decisions as otherwise developing, this too is of vital concern to the regulated transportation industry, for then future plans can be drawn on the basis of reasonable certainty in this field. In either event, until this Court reviews the matter, the present state of affairs is unsatisfactory not only to those providing for-hire interstate transportation, but also to those in the nation dependent upon such transportation for marketing the products of their labor.

CONCLUSION.

The specific question here is whether the Court below was right in holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits and vegetables (quick frozen) are agricultural commodities as that term is used in Section 203 (b)(6) of the Interstate Commerce Act. But while the question as thus posed would seem to be a fairly limited one, its ramifications are most extensive and important, for involved in this question is the test to be used, and its method to being applied,

in determining where the line should be drawn in classifying an almost limitless number of processed agricultural items as either "agricultural commodities" and thus permitted to be handled by interstate motor carriers outside of regulation, or "manufactured" products and thus permitted to be transported only by motor common carriers having certificates or permits issued by the Interstate Commerce Commission. From a long range standpoint, the question before this Court is, because of its extensive ramifications, of the greatest importance to the entire regulated transportation industry for the answer to it will determine the amount of capital and efforts which will be expended to improve and develop new transportation facilities for the movement of the Nation's agricultural production. This, of course, is not only a concern of the regulated transportation industry, but as well of the vast segment of the public dependent upon such industry for moving the products of its labors in interstate commerce. It is therefore respectfully submitted that the question here is a most substantial one.

Respectfully submitted,

CARL HELMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,
Counsel for Appellant Railroads.

CERTIFICATE OF SERVICE.

I, Carl Helmetag, Jr., attorney for the Appellant Railroads herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the Appellee, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Bank Building, Dallas, Texas;

2. On the Secretary of Agriculture, by mailing copies in a duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Esq., Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.;

3. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, the Honorable Herbert Brownell, Attorney General; and James E. Kilday, Esq., and Charles S. Sullivan, Jr., Esq., United States Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas; and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission by mailing copies in a duly addressed envelope, with postage prepaid to the Honorable Robert W. Ginnane, General Counsel, Washington, D. C.

5. On the several other parties by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. Macdonald, Esq., and Francis W. McInerny, Esq., Commonwealth Building, 1625 K St., N.W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N.W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C.; and by mailing copies in duly addressed envelopes, with air mail postage prepaid to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

Dated, this the 10th day of July, 1957.

Carl Helmetag, Jr.

APPENDIX "A."

LIST OF APPELLANT RAILROADS.

The below listed Railroads are the individual carriers which, together, comprise the Appellant Railroads. When used, the terms "Appellant Railroads" or "Railroads" include each of these named Railroads:

Akron, Canton and Youngstown Railroad Company
The Ann Arbor Railroad Company
The Atchison, Topeka & Santa Fe Railway Company
Atlantic Coast Line Railroad Company
The Baltimore & Ohio Railroad Company
Bangor and Aroostook Railroad Company
Boston and Maine Railroad
Central of Georgia Railway Company
The Central Railroad Company of New Jersey
Chicago & Illinois Midland Railway Company
Chicago and Northwestern Railway Company
Chicago, Burlington & Quincy Railroad Company
Chicago, Great Western Railway Company
Chicago, Indianapolis and Louisville Railway Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago, Rock Island and Pacific Railroad Company
The Delaware and Hudson Railroad
The Delaware, Lackawanna and Western Railroad Company
The Denver and Rio Grande Western Railroad Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company
Duluth, South Shore and Atlantic Railway Company
Elgin, Joliet and Eastern Railway Company
Erie Railroad
Florida East Coast Railway Company
Fort Dodge, Des Moine & Southern Railway Company
Grand Trunk Railway System
Great Northern Railway Company

Green Bay & Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
The Kansas City Southern Railway Company
Lehigh and New England Railroad Company
Lehigh Valley Railroad Company
Maine Central Railroad Company
Midland Valley Railroad Company
The Minneapolis & St. Louis Railway Company
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
The Nashville, Chattanooga & St. Louis Railway
New York Central System
The New York, Chicago & St. Louis Railroad Company
The New York, New Haven & Hartford Railroad Company
New York, Susquehanna and Western Railroad Company
Norfolk and Western Railway
Northern Pacific Railway Company
The Pennsylvania Railroad Company
The Pittsburgh and West Virginia Railway Company
Reading Company
St. Louis-San Francisco Railway Company
St. Louis Southern Railway Company
Seaboard Air Line Railroad Company
Southern Railway Company
Southern Pacific Company
The Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad
Union Pacific Railroad Company
Th Virginian Railway Company
Wabash Railroad Company
Western Maryland Railway
The Western Pacific Railroad Company

APPENDIX "B"

IN THE

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

Civil Action No. 8285

Frozen Food Express,

v.

United States of America and Interstate Commerce Commission

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is enjoined, suspended, annulled, vacated and set aside insofar as the

Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leaves are not agricultural commodities within the meaning of Section 203(b) (6) of the Interstate Commerce Act [49 U. S. C. 303(b) (6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. Hutcheson,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

Ben C. Connally,
United States District Judge.

T. N. Kennerly,
United States District Judge.

Nos.
258
263
270

SUPREME COURT, U.S.
FILED
JUL 1957
JAMES L. [illegible], Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 258

FROZEN FOOD EXPRESS, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,
Defendants.

MOTION TO AFFIRM

PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
617 First National Bank Bldg.,
Dallas, Texas.,
Attorneys for Frozen Food Express, Plaintiff.

Dated: June 7, 1957.

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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

FROZEN FOOD EXPRESS, *et al.*,

Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*,

Defendants.

MOTION TO AFFIRM

Plaintiff, Frozen Food Express, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial so as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment entered on March 14, 1957, by a District Court of three judges especially constituted pursuant to 28 U. S. C. 1253, 2284 and 2325, insofar as such judgment sets aside and enjoins

the Interstate Commerce Commission's order of April 13, 1951, concerning the following commodities:

> dried egg powder; dried egg yolks; powdered milk; buttermilk; quick frozen fruits and vegetables; and peanuts, shelled, ground.

Frozen Food Express, plaintiff, is a motor common carrier transporting numerous commodities which the Interstate Commerce Commission ruled were non exempt under 49 U. S. C. 203(b)(6). It contends that such commodities are agricultural commodities. Plaintiff instituted a suit before a three-judge United States District Court for the Southern District of Texas, Houston Division, to enjoin the order of the Interstate Commerce Commission and have the order set aside. (Order of Interstate Commerce Commission complained of reported in 52 M. C. C. 511.) Plaintiff alleged that it is a common carrier by motor vehicle holding a Certificate of Public Convenience and Necessity from the Interstate Commerce Commission which authorized it to transport certain commodities between designated points and territories, and that in addition to the transportation of the described commodities, it transports commodities which are exempt under said Section 203(b)(6), which transportation does not require a Certificate or Permit from the Interstate Commerce Commission so long as such motor vehicles are not used in carrying any other property or passengers for compensation.

The three-judge Federal Court dismissed the action saying that the order of the Commission was not subject to judicial review. On April 23, 1956, this Honorable Court

reversed the judgment of the District Court (351 U. S. 40, 44) (100 L. Ed. 910, 915). On September 13, 1956, the District Court heard this cause, and on December 31, 1956, rendered its decision. The opinion is included herein as plaintiff's Exhibit "A," and the judgment is plaintiff's Exhibit "B."

ARGUMENT

The decision of the District Court is correct as to the items of dried egg powder; dried egg yolks; milk, powdered; buttermilk; and quick frozen fruits and vegetables. As to the item "peanuts, shelled, ground," the District Court entered its order on motion of the Interstate Commerce Commission to correct clerical error in the judgment and opinion by substituting the phrase "ground peanut shells." This order was entered on April 22, 1957, and the item "peanuts, shelled, ground" should be no longer involved in this appeal. The District Court in its opinion followed the "continuing substantial identity test" prescribed by this Honorable Court in its decision *East Texas Motor Freight Lines, Inc. v. Frozen Food Express, et al., 351 U. S. 48-55*, and *100 L. Ed. 917-924*, wherein the Court said:

> "At some points processing and manufacturing will merge, but where the commodity retains a continuing substantial identity through the processing, we cannot say that it has been manufactured within the meaning of 203(b)(6)."

Applying this Honorable Court's opinion in the *Hartranft v. Wiegmann* case, *121 U. S. 609*, that "manufacture

implies a change but every change is not manufacture," the District Court found that frozen fruits and vegetables were within the scope of the agricultural exemption for the reason that the only thing that happened to the fresh product after it left the farmer's hand and before appearing in the familiar frozen food carton, was a processing as distinguished from manufacture. (See *Home Transfer and Storage Co. v. United States, 141 Fed. Supp. 599, affirmed by the Supreme Court of the United States without opinion, November 5, 1956, 352 U. S. 884.)* Likewise, the District Court held the commodities of dried egg powder; dried egg yolks; powdered milk and buttermilk, to be exempt for the reason that these commodities, having agricultural origin, had undergone some processing but retained their original identity. The decision of the District Court as to these items is plainly within the rule laid down by this Honorable Court prescribing the substantial continuing identity test.

We respectfully submit, therefore, that the defendants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Carl L. Phinney

CARL L. PHINNEY.
PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
617 First National Bank Bldg.,
Dallas, Texas.,
Attorneys for Frozen Food Express, Plaintiff.

PROOF OF SERVICE

I, Carl L. Phinney, attorney for Frozen Food Express, plaintiff herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 7th day of June, 1957, I served copies of the foregoing Motion to Affirm on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Honorable J. Lee Rankin, Solicitor General, and to its attorneys of record, James E. Kilday, Esq., U. S. Department of Justice, Washington 25, D. C., and Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas.

2. On the Interstate Commerce Commission, defendant herein, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Mr. Charlie H. Johns, Jr., attorney for the Interstate Commerce Commission, at the office of the Interstate Commerce Commission, Washington 25, D. C.

3. On the Secretary of Agriculture as intervening plaintiff by mailing copy in duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Office of the Solicitor, U. S. Department of Agriculture, Washington 25, D. C.

4. On the several intervening defendants by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to-wit: Peter T. Beardsley c/o American Trucking Associations, Inc., 1424 Sixteenth St., N. W., Washington 6, D. C.; Dale C. Dillon,

944 Washington Bldg., Washington 5, D. C.; James W. Nisbet, 280 Union Station Bldg., Chicago 6, Illinois; Carl Helmetag, c o Pennsylvania Railroad, Transportation Center Building, Six Penn Center Plaza, Philadelphia, Pennsylvania.

Carl L. Phinney

CARL L. PHINNEY.

PHINNEY AND HALLMAN,
CARL L. PHINNEY,
LEROY HALLMAN,
617 First National Bank Bldg.,
Dallas, Texas,
Attorneys for Frozen Food Express, Plaintiff.

EXHIBIT "A"

In the

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial

review, was reversed by the Supreme Court (351 U. S. 40), and the action remanded for consideration on the merits. This requires a review of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under §303 (b)(6) of Title 49, U. S. C. A., their carriage by a motor carrier is substantially free from I. C. C. regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk,

powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows: frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc. v. Frozen Food Express (128 F. Supp. 374 at 379)*, we considered slaughtered cattle, fresh and frozen meat and meat products to be non-exempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U. S. 49); wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn. v. U. S. (207 U. S. 556 at 562)*:

> "* * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U. S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'."

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing

substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203(b)(6)."

Applying this most recent test, a three-judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc. v. U. S. (144 F. Supp. 814)*, held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company v. U. S. (141 F. Supp. 599)*. This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 *(352 U. S. 884)*.

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid I. C. C. control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled, ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

For the reason set forth in our opinion *Frozen Food Express v. U. S. (128 F. Supp. 374 at 379 et seq.)*, we hold to be non-exempt the following: slaughtered cattle, fresh meat, meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment

and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product," it may well be that these items illustrate the point at which processing merges with manufacturing.[1]

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accor[illegible] with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. HUTCHESON, JR.,
Chief Judge, Fifth Circuit.

/s/ BEN C. CONNALLY,
United States District Judge.

/s/ T. M. KENNERLY,
United States District Judge.

[1]In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the plaintiff contends to the contrary.

EXHIBIT "B"

In the

District Court of the United States

FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION.

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing

its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peaunts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches pealed, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leafs are not agricultural commodities within the meaning of Section 203(b)(6) of the Interstate Commerce Act [49 U. S. C. 303(b)(6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. HUTCHESON, Chief Judge,
United States Court of Appeals
for the Fifth Circuit.

BEN C. CONNALLY,
United States District Judge.

T. N. KENNERLY,
United States District Judge.

Office - Supreme Court, U.S.
FILED
JUL 30 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957 No. 258

AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, et al.,

Appellants,

v.

FROZEN FOOD EXPRESS, et al.,

Appellees

BRIEF OF THE APPELLANT RAILROADS IN REPLY TO THE MOTION TO AFFIRM ON BEHALF OF APPELLEE, FROZEN FOOD EXPRESS

CARL HELMETAG, JR.,
1138 Transportation Center,
Six Penn Center Plaza,
Philadelphia 4, Pa.

JAMES W. NISBET,
280 Union Station Building,
Chicago 6, Ill.

CHARLES P. REYNOLDS,
Seaboard Air Line R. R. Building,
Norfolk 10, Va.

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Interstate Commerce Commission *v.* Frozen Food Express, No. 270, October Term, 1957 (U. S. Sup. Ct.) 2

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957. No. 258.

Akron, Canton and Youngstown Railroad Company, et al.,
Appellants,

v.

Frozen Food Express, et al.,
Appellees

BRIEF OF THE APPELLANT RAILROADS IN REPLY TO THE MOTION TO AFFIRM FILED ON BEHALF OF APPELLEE, FROZEN FOOD EXPRESS.

I.

STATEMENT.

By a motion duly served[1] on counsel for the Railroads—which include all of those railroads set forth in Appendix A

[1] It is difficult to fix the date on which the Appellee's Motion to Affirm was served because for reasons unknown to these Appellant Railroads, counsel for the Appellee made available the Motion to Affirm both to this Court and to counsel for the Appellants before receiving the several appellants' Statements of Jurisdiction. It is believed that this Court could not accept the motion to affirm for filing until the several appeals were docketed. If this is so, the service date for the motion to affirm could not be before July 10, 1957 and if Rule 16 is to govern, it would appear that the last service date of the Motion to Affirm would be no earlier than August 10 or thereabouts. Since this reply brief was filed with this Court on or before July 31, 1957, it is believed that this brief was timely filed.

of the Appellant Railroads' Statement of Jurisdiction filed with this Court on July 19, 1957 and assigned case No. 258 October Term, 1957, the Appellee, Frozen Food Express, has asked this Court to affirm an order of the Court below without receiving briefs or hearing oral arguments on the merits. The order of the Court below which the Appellee has asked this Court to affirm is set forth in Appendix B of the Appellant Railroads' Statement of Jurisdiction and from the standpoint of the instant appeal, enjoins the Interstate Commerce Commission from enforcing its order issued in *Determination of Exempted Agricultural Commodities*, 52 M. C. C. 511 (1951), insofar as the Commission in that order found and concluded that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are not agricultural commodities within the meaning of Section 203 (b)(6) of the Interstate Commerce Act, 49 U. S. C. 303 (b)(6). The opinion of the Court below setting forth the basis for its order which is the subject of this appeal is reported in *Frozen Food Express* v. *United States*, 148 F. Supp. 399 (S. D. Texas 1956).

The particular Section of the order of the Court below which is the subject of the instant appeal is also the subject of two other appeals to this Court, one brought by the Interstate Commerce Commission[2] and the other brought by the American Trucking Associations Inc.[3] The issues in each of these appeals are identical. Although it appears from its caption that the Appellee's Motion to Affirm is only filed in the appeal of the Interstate Commerce Commission, any action upon it by this Court will govern all three appeals so that therefore it must be assumed that the Motion to Affirm for all practical purposes has been filed in the instant appeal. Accordingly, it is deemed appropriate under the provisions of Rule 16, par. 3 for these Appellant railroads to file this brief in reply to the Appellee's Motion to Affirm

[2] *Interest Commerce Commission* v. *Frozen Food Express*, No. 270, October Term, 1957 (U. S. Sup. Ct.)

[3] *American Trucking Associations Inc.* v. *Frozen Food Express*, No. 263, October Term, 1957 (U. S. Sup. Ct.).

regardless of whether from a purely technical standpoint, the motion to affirm has been properly filed in the instant appeal.

The immediate question before this Court by reason of the Appellee's Motion to Affirm is whether the order of the Court below to the extent that it is the subject of appeal, should be affirmed without this Court considering briefs and oral arguments addressed to the merits. Without in any way denying the desirability of terminating litigation by the simplest means, particularly where the simple approach is frugal of this Court's most precious time, and of its greatly extended energies, this is peculiarly an instance where a full consideration of this Court, in the long run will reduce litigation and do much to bring certainty in a field where its lack has not only been a source of widespread disturbances to the nation's transportation industry, but also of serious harm to a considerable segment of the nation's economy which is dependent upon for-hire transportation to move the products of its labor in interstate commerce.

These Appellant Railroads are asking this Court to note probable jurisdiction of this appeal and to receive both written and oral arguments, in the firm belief that such a complete consideration will provide the only feasible basis for terminating a course of litigation that has been troubling the federal courts and the Interstate Commerce Commission for many years, and which has created great confusion, uncertainty and distress throughout the nation's transportation industry.

II.

ARGUMENT.

A. There is Nothing in the Motion to Affirm To Refute the Contentions of These Appellants That the Question Here Involved Is A Substantial One.

It is clear beyond all doubt that the Motion to Affirm filed on behalf of the Appellee, Frozen Food Express, is in no way addressed to the contentions made by these Appel-

lant Railroads in their Statement of Jurisdiction,[4] and that it contains no argument which answers those presented by these Appellants as to why the question here is a substantial one.

Reduced to essentials, Appellee's Motion to Affirm contains but one reason why the order of the Court below should be affirmed without briefs and arguments on the merits. That reason set forth on Pages 3 and 4 of the Motion is to the effect that the Court below has correctly applied the "continuing substantial identity test" pronounced by this Court in *East Texas Lines* v. *Frozen Food Express*, 351 U. S. 49 (1956), in holding that dried egg powder; dried egg yolks; milk, powdered; buttermilk; and fruits or vegetables (quick frozen) are "agricultural commodities" as that term is used in Section 203 (b)(6) of the Interstate Commerce Act. Nothing beyond a naked assertion is offered to show why the Court below was correct in its application of the test and similarly, there is no explanation as to why the Interstate Commerce Commission was wrong in reaching conclusions diametrically different from those of the Court below.

Without again presenting the arguments set forth in the Statement of Jurisdiction of these Appellants, but at the same time specifically inviting attention to them, it is by no means clear that the Court below either adequately understood the continuing substantial identity test, or properly applied it to the particular commodities here involved. As these Appellants in their Statement of Jurisdiction have previously indicated in some detail, it appears that the Court below has misunderstood this Court's opinion in the *East Texas Lines* case, as have other federal district courts, and that these misunderstandings have produced results, which, at the very least, are creative of extensive confusion and uncertainty. This confusion and uncertainty, typified by the Court's conclusion that fresh eggs and fresh milk

[4] Indeed it would be surprising if such were the case in view of the fact that the Motion to Affirm was prepared, printed, and made available to this Court before the Statement of Jurisdiction was either filed with this Court or served upon counsel for the Appellee.

retain a continuing substantial identity even when by extensive processing they are converted to powdered eggs and powdered milk, which nowhere are sold or regarded as the equivalent of the fresh products, is not a matter of mere academic or intellectual concern, but of nation-wide practical importance. This is true because so long as uncertainty and confusion exist as to how the exemption in Section 203 (b)(6) should be interpreted and applied the nation's regulated transportation industry can neither sensibly program capital expenditures for the type of equipment required to move manufactured agricultural commodities, nor economically devote its energies and efforts to improve the methods of handling such traffic. Harmful as this is to the transportation industry, the matter does not end there, for the orbit of harm extends further and visits severe consequences upon those throughout the nation who depend on the regulated transportation industry to market the products of their labor. In every sense therefore, this is a case of national importance which should only be decided after the fullest consideration by this Court.

III.

THE RELIEF REQUESTED.

For the reasons set forth above and for the reasons detailed more fully in the Statement of Jurisdiction of these Appellant Railroads it is most respectfully submitted that the Motion to Affirm should be denied and that this Court should note probable jurisdiction and thereupon assign this case for oral argument to be implemented by the submission of printed briefs on the merits.

Respectfully submitted,

CARL HEEMETAG, JR.,
JAMES W. NISBET,
CHARLES P. REYNOLDS,
Counsel for Appellant Railroads.

CERTIFICATE OF SERVICE.

I, Carl Helmetag, Jr., attorney for the Appellant Railroads herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Statement of Jurisdiction on the several parties to this action as follows:

1. On the Appellee, Frozen Food Express, by mailing copies in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record, Carl L. Phinney, Esq., and Leroy Hallman, Esq., First National Bank Building, Dallas, Texas;

2. On the Secretary of Agricultural, by mailing copies in a duly addressed envelope, with postage prepaid, to his attorney of record, Charles W. Bucy, Esq., Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.;

3. On the United States of America, by mailing copies in duly addressed envelopes, with postage prepaid, to its attorneys, the Honorable Herbert Brownell, Attorney General; and James E. Kilday, Esq., and Charles S. Sullivan, Jr., Esq., United States Department of Justice, Washington 25, D. C.; by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney of record, Malcolm R. Wilkey, Esq., United States Attorney, Houston, Texas: and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Honorable J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

4. On the Interstate Commerce Commission by mailing copies in a duly addressed envelope, with postage prepaid to the Honorable Robert W. Ginnane, General Counsel, Washington, D. C.

5. On the several other parties by mailing copies in duly addressed envelopes, with postage prepaid, to their respective attorneys of record, to wit: David G. Macdonald, Esq., and Francis W. McInerny, Esq., Commonwealth Building, 1625 K St., N.W., Washington 6, D. C.; Peter T. Beardsley, Esq., and Fritz Kahn, Esq., c/o American Trucking Associations, Inc., 1424 Sixteenth Street, N.W., Washington 6, D. C.; Dale C. Dillon, Esq., and Clarence D. Todd, Esq., 944 Washington Building, Washington 5, D. C.; and by mailing copies in duly addressed envelopes with air mail postage prepaid to Rollo E. Kidwell, Esq., 301 Empire Bank Building, Dallas, Texas; and Lee Reeder, Esq., 1012 Baltimore Avenue, Kansas City 5, Missouri.

Dated, this the 31st day of July, 1957.

Carl Helmetag, Jr.

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JOHN T. FEY, Clerk

No. 263

IN THE

Supreme Court of the United States

October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

FROZEN FOOD EXPRESS,
Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston Division

---

JURISDICTIONAL STATEMENT

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Cases

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§205(g)	2
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No.

IN THE

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October Term, 1957

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

FROZEN FOOD EXPRESS,
Appellee.

Appeal from the United States District Court for the Southern District of Texas, Houston Division

---

JURISDICTIONAL STATEMENT

Appellant, American Trucking Associations, Inc., appeals from the judgment of the United States District Court for the Southern District of Texas, Houston Division, entered on March 14, 1957, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, has not been reported, but a copy is attached hereto as Ap-

pendix A. A copy of the judgment of the District Court is attached hereto as Appendix B. The report of the Interstate Commerce Commission is reported at 52 M.C.C. 511. The order of the Interstate Commerce Commission has not been reported but is attached hereto as Appendix C.

JURISDICTION

This is an action to suspend, enjoin and set aside the report and order of April 13, 1951, of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities,* pursuant to section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. §§1336, 1398, 2284 and 2321-2325. The judgment of the District Court was entered on March 14, 1957, and notice of appeal was filed in that court on May 13, 1957. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Interstate Commerce Commission v. Home Transfer & Storage Co., Inc.,* 352 U.S. 884, 77 S. Ct. 129; *East Texas Motor Fr. Lines* v. *Frozen Food Express,* 351 U.S. 49, 76 S. Ct. 574; *Frozen Food Express* v. *United States,* 351 U.S. 40, 76 S. Ct. 569.

QUESTION PRESENTED

Whether the District Court was in error in enjoining and setting aside the report and order of the Interstate Commerce Commission insofar as the Commission found and concluded that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick frozen fruits and vegetables were not agricultural commodities (not in-

cluding manufactured products thereof) within the meaning of section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. §303(b)(6)?

STATEMENT

The history of this proceeding is recited clearly and concisely at the beginning of the Supreme Court's earlier opinion herein, *Frozen Food Express* v. *United States*, 351 U.S. 40, 41-43, 76 S. Ct. 569, 569-571. It need not be repeated, though as a matter of convenience that portion of the opinion is attached hereto as Appendix D.

The Supreme Court in its previous disposition of the instant case held the issues raised in the complaint to be justiciable and remanded the proceeding to the District Court for adjudication of the merits. The District Court, without discussing the evidence on which the Interstate Commerce Commission's report and order were based and in apparent reliance on the Supreme Court's decisions in *Interstate Commerce Commission* v. *Home Transfer & Storage Co., Inc.*, 352 U.S. 884, 77 S. Ct. 129, and *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49, 76 S. Ct. 574, found dried egg powder, dried egg yolks, powdered milk, buttermilk and quick frozen fruits and vegetables to be agricultural commodities (not including manufactured products thereof) within the meaning of section 203(b)(6) of the Interstate Commerce Act.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court should be reversed unless it can be said that the Interstate Commerce Commission should have found *as a matter of law* that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables are "agricultural commodities (not including manufactured products thereof)" within the meaning of section 203(b)(6) of the Interstate Commerce Act. Certainly the factual record in

Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, would not have permitted the Commission to reach such a conclusion. On the contrary, the testimony in that proceeding was conclusive that the enumerated items were "manufactured" products of agricultural commodities.

The testimony in that proceeding was offered almost exclusively by the United States Department of Agriculture and interveners on its side. Neither the motor carriers nor the railroads presented direct or rebuttal evidence. The motor carriers and railroads, as they had before, urged a narrow construction of the agricultural exemption; the Department of Agriculture and the interveners on its side were seeking a broad, or liberal, construction. Nevertheless, the testimony of the witnesses and the exhibits offered by the Department of Agriculture were to the effect that dried egg powder, dried egg yolks, powdered milk, buttermilk and frozen fruits and vegetables were "manufactured" products of agricultural commodities.

Dr. Hugh C. McPhee, Assistant Chief of the Bureau of Animal Industry of the Department of Agriculture, testified as to the numerous livestock items and the various treatments which they undergo. He stated that in his opinion the dehydration of eggs converted the eggs into manufactured products (Transcript, page 907). Dr. McPhee stood as sponsor of Exhibit 26, on page 2 of which dried egg power and dried egg yolks were specifically listed as "manufactured" agricultural commodities.

Assistant Chief Earle O. Whittier of the Division of Dairy Products Research, Bureau of Dairy Industry, United States Department of Agriculture, was the expert witness on the dairy group of agricultural commodities and the various processing treatments which they undergo. Exhibit 25, which he sponsored, indicated the fer-

menting, curdling, churning, concentrating or drying of milk, skim milk or cream to be manufacturing processes and listed dried milk and buttermilk to be "manufactured" products.

Dr. Victor R. Boswell, Principal Horticulturist of the Department of Agriculture's Bureau of Plant Industry, testified as to the vegetable group. Dr. Boswell distinguished between natural freezing, as in the case of parsnips left in the ground to freeze, and the artificial freezing of a vegetable after it has been cleaned and otherwise prepared and then blanched or scalded before quick freezing (Transcript, page 972). Likewise, when ascorbic acid, sugar or sirup is added in the quick-freezing treatment, Dr. Boswell said, such addition would convert the commodity into a manufactured product (Transcript, page 974). Dr. Boswell sponsored Exhibit 27, which showed frozen vegetables to be "manufactured" agricultural commodities. As used in Exhibit 27, the term "freezing" was intended to identify the entire "quick-freeze" process, including the preparatory steps preceding freezing; the freezing alone was said not to constitute manufacturing.

Head Horticulturist Dr. John R. Magness of the Division of Fruits and Vegetable Crops and Diseases, Bureau of Plant Industry, United States Department of Agriculture, testified as to the fruit group of agricultural commodities. Dr. Magness observed that the quick-freezing of fruits generally involved the addition of ingredients other than the fruit that is being frozen, particularly such ingredients as sugar or sirup. He concluded that, if ingredients other than the fruit were added, the frozen mixture should be regarded as a manufactured product (Transcript, pages 1091-1092). The sugar that is added penetrates the fruit; it becomes an integral part and cannot be separated again. That, he said, constitutes "manufacturing" (Transcript, page 1117). Accordingly, Exhibit 31, for which Dr. Magness stood sponsor, listed quick-

frozen fruits as "manufactured" agricultural commodities.

The foregoing summarizes the testimony and exhibits pertaining to dried egg powder, dried egg yolks, powdered milk, buttermilk and frozen fruits and vegetables. There was no dissention from the consistent expression of opinion of the Department of Agriculture's well-qualified witnesses that these were "manufactured" agricultural commodities. The report and order recommended by Hearing Examiner C. Evans Brooks, served July 29, 1949, properly found that the dehydrating of eggs (Sheet 42), the fermenting, curdling or drying of milk, cream or skim milk (Sheet 42) and the quick-freezing of fruits and vegetables (Sheet 39) created new or different products, having distinctive names, characteristics or uses, which by any proper test fell in the category of "manufactured" products. No exceptions were noted to the Examiner's findings with respect to these products (52 M.C.C. 511), and the Commission's conclusions simply affirmed these findings.

Had the Commission reached any other conclusions—had it found that dried egg powder, dried egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables were not new and different products, separate and distinct from the commodities from which they were derived—the motor carriers and the railroads surely would have gone to court to have the report and order set aside. What court would not have found for the complainants on the ground that the assailed findings were completely unsupported by and contrary to the evidence? What a paradox that within a short span of fixe years the aura of the proceeding should have been so dispelled that the District Court could actually say that, in the face of a solid wall of evidence to the contrary, the Interstate Commerce Commission should have found *as a matter of law* that dried egg powder, dried

egg yolks, powdered milk, buttermilk and quick-frozen fruits and vegetables are "agricultural commodities (not including manufactured products thereof)" within the meaning of section 203(b)(6) of the Act.

Whether the findings set aside by the District Court represented questions of law or fact, whether the Commission's conclusions were to be binding upon the Court or were only to be given great weight and whether the District Court properly reviewed the Commission's decision or exceeded the bounds of judicial review—these are largely academic questions that can be left for treatment in the brief. What matters here is that the District Court has insisted on a construction that completely disregards the comprehensive and convincing evidence before the Commission. The Court set itself up as knowing more about these agricultural commodities than the Commission, knowing more than the Department of Agriculture's witnesses—and all on the thin thread that the commodities should have been found to be "manufactured" *as a matter of law*. The Supreme Court should note probable jurisdiction herein to permit appellant to argue on brief and orally that the Interstate Commerce Commission under no circumstance could have found the commodities not to have been "manufactured".

The question is substantial. Involved is the transportation of 3,248,000 pounds of dried egg powder and 9,270,000 pounds of dried egg yolks (Statistical Abstract of the United States 1956, Washington, D. C., 1956, p. 691), 1,516,107,000 pounds of powdered milk (*Id.*, p. 690) and 2,227,365,000 pounds of frozen fruits and vegetables (National Association of Frozen Food Packers, *Frozen Food Pack Statistics:* 1956, Washington, D. C., 1957, Parts 1 & 2, p. 4) produced annually within the United States. Under the consistent construction and general understanding prevailing since the outset of motor carrier regulation in 1935 the for-hire transpor-

tation of these commodities has been accomplished by Interstate Commerce Commission-regulated common and contract carriers. The regulated carriers desire to continue to participate in the movement of this traffic, but they cannot do so if they must encounter the untrammeled competition of unregulated truck operators. The effect of the District Court's decision is to make this freight available to all comers, irrespective of need for service, fitness of operator, reasonableness of rates, coverage of insurance and so on. The adverse effect upon the transportation system of the Nation—and the public that is dependent upon it—of the resultant cutthroat competition is generally recognized. The reversal of the District Court's decision and the sustaining of the Interstate Commerce Commission's report and order that dried egg powder, dried egg yolks, powdered milk, buttermilk, and quick-frozen fruits and vegetables are "manufactured" agricultural commodities within the meaning of Section 203(b)(6) will help greatly towards restoring stability and responsibility in the transportation of these items.

WHEREFORE, the Supreme Court should note probable jurisdiction herein and should reverse the decision of the District Court for the Southern District of Texas, Houston Division.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

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Dallas 1, Texas

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FRITZ R. KAHN
1424 Sixteenth Street, N. W.
Washington 6, D. C.
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for the appellant herein and a member of the bar of the Supreme Court of the United States, hereby certify that, on the twelfth day of July, 1957, I served copies of the foregoing Jurisdictional Statement on the several parties, as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Honorable J. Lee Rankin, Solicitor General, U. S. Department of Justice, Washington 25, D. C.; by mailing copies in a duly addressed envelope, with postage prepaid, to James E. Kilday and Charles S. Sullivan, Jr., Esquires, Special Assistants to the Attorney General, U. S. Department of Justice, Washington 25, D. C.; and by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Malcolm R. Wilkey, Esquire, United States Attorney, Houston, Texas.

2. On the Interstate Commerce Commission, by mailing copies in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane and C. W. Johns, Esquires, Office of the General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the Department of Agriculture, by mailing a copy in a duly addressed envelope, with postage prepaid, to Charles W. Bucy, Esquire, Office of the General Counsel, U. S. Department of Agriculture, Washington 25, D. C.

4. On Frozen Food Express, the plaintiff before the District Court, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Carl L. Phinney, Esquire, Phinney and Hallman, 617 First National Bank Building, Dallas, Texas.

5. On the railroad interveners, by mailing a copy in a duly addressed envelope, with postage prepaid, to Carl

Helmetag, Esquire, Pennsylvania Railroad, Transportation Center Building, Philadelphia, Pennsylvania; by mailing a copy in a duly addressed envelope, with postage prepaid, to Charles P. Reynolds, Esquire, Shoreham Building, Washington 5, D. C.; and by mailing a copy in a duly addressed envelope, with postage prepaid, to James W. Nisbet, Esquire, Association of Western Railways, 280 Union Station Building, Chicago 6, Illinois.

6. On other intervening parties, by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Edwin N. Bell, Esquire, Esperson Building, Houston, Texas; by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to J. C. Hutcheson, III, Esquire, Esperson Building, Houston, Texas; by mailing a copy in a duly addressed envelope, with airmail postage prepaid, to Lee Reeder, Esquire, Reeder, Gisler and Griffin, 1012 Baltimore Avenue, Kansas City, Missouri; and by mailing a copy in a duly addressed envelope, with postage prepaid, to Dale C. Dillon, Esquire, Todd, Dillon and Singer, 1825 Jefferson Place, N. W., Washington 6, D. C.

PETER T. BEARDSLEY

1424 Sixteenth Street, N. W.
Washington 6, D. C.
July 12, 1957

APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Phinney & Hallman (Carl L. Phinney) of Dallas, Texas; for Plaintiff.

Walter D. Matson, U. S. Department of Agriculture of Washington, D. C.; for U. S. Department of Agriculture.

James H. Durkin, U. S. Department of Justice, of Washington, D. C.; for United States of America.

Leo H. Pou, Interstate Commerce Commission, of Washington, D. C.; for Interstate Commerce Commission.

Peter T. Beardsley of Washington, D. C.; for American Trucking Associations, Inc.

Dale C. Dillon of Washington, D. C.; for Com-Carrier Conference-Irregular Route and Contract Carrier Conference.

Carl Helmetag of Philadelphia, Pennsylvania, and James W. Nisbet of Chicago, Illinois; for Class I Railroads.

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial review, was reversed by the Supreme Court (351 U.S. 40), and the action remanded for consideration on the merits. This requires a review of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under § 303(b)(6) of Title 49, U.S.C.A. their carriage by a motor carrier is substantially free from ICC regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (pack-

aged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows: frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (128 F. Supp. 374 at 379), we considered slaughtered cattle, fresh and frozen meat and meat products to be non-exempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U.S. 49), wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn.* v. *U. S.* (207 U.S. 556 at 562).

> ". . . Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in Hartranft v. Wiegmann, 121 U.S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'"

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage.

we cannot say that it has been 'manufactured' within the meaning of § 203(b)(6)."

Applying this most recent test, a three judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc.* v. *U. S.* (144 F. Supp. 814) held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company* v. *U. S.*, 141 F. Supp. 599). This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 (352 U.S. 884).

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' sheives, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid ICC control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits

or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; redried tobacco leafs.

For the reason set forth in our opinion *Frozen Food Express* v. *U. S.* (128 F. Supp. 374 at 379 et seq.), we hold to be non-exempt the following: slaughtered cattle; fresh meat; meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of peaches or of condensed milk may not properly be described as a "manufactured product", it may well be that these items illustrate the point at which processing merges with manufacturing.[1]

---

[1] In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the Plaintiff contends to the contrary.

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accord with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. Hutcheson, Jr.
Chief Judge, Fifth Circuit

/s/ Ben C. Connally
United States District Judge

/s/ T. M. Kennerly
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951 in a proceeding docketed by the Commission as No. MC-C-968, *De-*

termination of Exempted Agricultural Commodities, is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanut shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leafs are not agricultural commodities within the meaning of Section 203(b)(6) of the Interstate Commerce Act (49 U.S.C. 303(b)(6)); and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March 1957.

/s/ J. C. Hutcheson, Jr.
J. C. Hutcheson, *Chief Judge*
United States Court of Appeals
for the Fifth Circuit

/s/ Ben C. Connally
United States District Judge

/s/ T. M. Kennerly
United States District Judge

APPENDIX C

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of April, A. D. 1951.

No. MC-C-968

DETERMINATION OF EXEMPTED AGRICULTURAL COMMODITIES

No. MC-107669

NORMAN E. HARWOOD CONTRACT CARRIER APPLICATION

It appearing, That by order entered in No. MC-C-968, the Commission, on its own motion, instituted an investigation into and concerning the meaning of the words "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act;

It further appearing, That on December 16, 1947, the Commission, division 5, entered its report, 47 M.C.C. 597, and order in No. MC-107669 granting applicant, Norman E. Harwood, a permit authorizing certain operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, and otherwise denying the application;

It further appearing, That upon consideration of petitions filed by the Secretary of Agriculture and the Atlantic Commission Co., Inc., and others, the Commission reopened the proceeding in No. MC-107669 for further hearing on a consolidated record with No. MC-C-968;

And it further appearing, That full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed its

report on oral argument herein containing its findings of fact and conclusions thereon, which report and the report and order of December 16, 1947, in No. MC-107669, are hereby referred to and made a part hereof:

It is ordered, That the proceeding in No. MC-C-968 be, and it is hereby discontinued.

It is further ordered, That the order of December 16, 1947, in No. MC-107669 be, and it is hereby, vacated and set aside.

And it is further ordered, That the application in No. MC-107669, be, and it is hereby, denied.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

APPENDIX D

(Excerpt from opinion of Supreme Court of the United States in *Frozen Food Express v. United States*, 351 U.S. 40, 41-42, 76 S. Ct. 569, 569-571.)

* * * *

Part II of the Interstate Commerce Act; 49 Stat. 543, as amended, 49 U.S.C. § 301 et seq., 49 U.S.C.A. § 301 et seq., grants the Commission pervasive control over motor carriers. Common carriers and contract carriers by motor vehicle, subject to that part of the Act, must have a certificate of public convenience and necessity or a permit issued by the Commission. §§ 206(a), 209(a). The Commission has powers of investigation to determine if a motor carrier has complied with the Act; and it has authority to issue an order compelling compliance. § 204 (c). These requirements for a certificate or permit * are not, however, applicable to "motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation." § 203(b)(6).

The controversy in these cases centers around this "agricultural" exemption. After an investigation instituted on its own motion, the Commission issued an order that specified commodities are not "agricultural" within the meaning of § 203(b)(6).

The hearing to determine the meaning and application of the term "agricultural * * * commodities (not including manufactured products thereof)" as used in § 203(b)(6) was held before an examiner. It was a

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* Exempted carriers are also not subject to the provisions concerning rates and charges, §§217, 218, nor to the requirements concerning bodily injury and property damage insurance §215.

public hearing at which various governmental officials and agencies and various producers, shippers, and carriers appeared and presented evidence. The Commission's decision was in the form of a report and order. 52 M.C.C. 511. The report, which concerns various groups of commodities, covers 71 pages of the printed record. The findings list those commodities that the Commission finds are exempted under § 203(b)(6) and those that are not. The order of the Commission incorporates the "findings" and states that the proceeding "be, and it is hereby discontinued."

Frozen Food Express, the plaintiff, is a motor carrier transporting numerous commodities which the Commission ruled were nonexempt under § 203(b)(6) but which the carrier claims are "agricultural commodities." Plaintiff, who was not a party to the administrative proceeding, instituted suit before a three-judge District Court, 28 U.S.C. § 2325, 28 U.S.C.A. § 2325, to enjoin the order of the Commission and have it set aside, naming the United States and the Commission as defendants. 28 U.S.C. § 1336, 28 U.S.C. § 1336; 49 Stat. 550, as amended, 49 U.S.C. § 305(g), 49 U.S.C.A. § 305(g); 60 Stat. 243, 5 U.S.C. § 1009, 5 U.S.C.A. § 1009. The complaint alleged that plaintiff is a common carrier by motor vehicle, holding a certificate of public convenience and necessity which authorizes it to transport certain commodities between designated points and places; that plaintiff is transporting, in addition to those commodities, commodities which are exempt under § 203(b)(6) and for which plaintiff has sought no authority from the Commission; that the Commission in its order has held the latter commodities nonexempt and accordingly has deprived it of the right granted by the statute; that the order of the Commission classifying certain commodities as nonexempt is unlawful; and that the Commission threatens to enjoin transportation of the commodities which plaintiff claims are exempt. The Secretary of Agriculture

intervened, supporting plaintiff's position on some of the commodities. Other interveners are trucking associations and railroads which support the Commission. The United States as a defendant supports the Commission on some of its findings and opposes it on others.

The District Court, being of the view that the case was controlled by United States v. Los Angeles & S.L.R. Co., 273 U.S. 299, 47 S. Ct. 413, 71 L.Ed. 651, dismissed the action, saying that the "order" of the Commission was not subject to judicial review. 128 F. Supp. 374. The cases are here by appeal. 28 U.S.C. §§ 1253, 2101(b), 28 U.S.C.A. §§ 1253, 2101(b).

No. ——

In the Supreme Court of the United States

OCTOBER TERM, 1957

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS, Jr.,
Assistant General Counsel,
Interstate Commerce Commission, Washington 25, D. C.

JULY 12, 1957.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No.——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

FROZEN FOOD EXPRESS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 148 F. Supp. 399, and is set forth in Appendix A to this statement. Reproduced as Appendix B is the judgment entered on March 14, 1957. The report of the Commission is printed at 52 M. C. C. 511. Ten copies thereof are being filed with the clerk.

JURISDICTION

The action was brought under 28 U. S. C. 1336 to set aside an order of the Interstate Commerce Commission. The judgment of the District Court

was entered on March 14, 1957 and notice of appeal was filed in that court by the Commission on May 13, 1957.

The jurisdiction of this court to review the decision of the District Court on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b) and is sustained by the decision in the former appeal in this action, *Frozen Food Express* v. *United States,* 351 U. S. 40, where this Court held the order to be reviewable.

STATUTES INVOLVED

The National Transportation Policy (49 U. S. C., preceding §§ 1, 301, 901, and 1001), reads as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation service, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and

equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203 (b) (6) of the Interstate Commerce Act (49 U. S. C. 303 (b) (6)) reads, in part, as follows:

Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment, shall be construed to include * * * (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), *agricultural* (including horticultural) *commodities* (*not including manufactured products thereof*), if such motor vehicles are not used in carrying any other property, or passengers, for compensation * * *. [Emphasis added.]

Section 206 (a) reads, in part, as follows:

* * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway * * * unless there is in force with respect to such car-

rier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

QUESTION PRESENTED

Whether the District Court, in setting aside the conclusion of the Interstate Commerce Commission in *Determination of Exempted Agricultural Comodities,* 52 M. C. C. 511, that the exemption from motor carrier economic regulations provided by Section 203 (b) (6) of the Interstate Commerce Act for "agricultural commodities (not including manufactured products thereof)" does not apply to the transportation of powdered milk, dried egg powder, dried egg yolks, buttermilk and quick frozen fruits and vegetables, misapplied the continuing substantial identity test laid down by this court in *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Express,* 351 U. S. 49.

STATEMENT

This case arises out of an action commenced in 1954 in the United States District Court for the Southern District of Texas, seeking to set aside the Commission's decision in *Determination of Exempted Agricultural Commodities, supra,* insofar as it held that the transportation of certain commodities was not exempt under Section 206 (b) (6). At the same time, the appellee commenced another action in the same court seeking to set aside an order of the Commission directing appellee to cease and desist from the interstate

transportation of fresh and frozen meat and fresh and frozen dressed poultry without an appropriate certificate or permit under Part II of the Act. In the latter case, the three-judge court held that the transportation of fresh and frozen meat was not exempt under Section 203 (b) (6), but that the transportation of fresh and frozen dressed poultry was exempt. Upon appeal from that portion of the decision of the lower court relating to fresh and frozen dressed poultry, this Court affirmed—with Justices Burton, Frankfurter, Minton, and Harlan dissenting. *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49.

In the instant case, the three-judge court originally held that the Commission's decision in the *Determination* proceeding was not a reviewable order (128 F. Supp. 374). Upon appeal, this Court reversed, holding that the Commission's decision in that proceeding was reviewable, and remanded the case to the court below for adjudication of the issues raised by the complaint. *Frozen Food Express* v. *United States*, 351 U. S. 40. Following the remand, the court below held that the following commodities were exempt agricultural commodities under Section 203 (b) (6):

> * * * frozen whole eggs; dried egg powder, dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk*; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged

in cellophane bags or boxes*; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry* (although not drawn); rolled barley; cottonseed hulls; beans* (packaged, dried artificially or packed in small containers for retail trade); dried fruits* (dried mechanically or artifically); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D*; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, deawned or scarified; and redried tobacco leaves.*[1]

At the same time, the court below held that the following commodities were not within the exemption:

> * * * slaughtered cattle; fresh meat; meat products; cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; and milk condensed.

THE QUESTION IS SUBSTANTIAL

We submit that the decision below, in holding that powdered milk, dried egg powder, dried egg yolks, buttermilk and quick frozen fruits and vegetables are agricultural commodities whose transportation is exempt from motor carrier economic regulation under Section 203 (b) (6)

[1] There was no dispute between the parties over those commodities marked with an asterisk.

has erroneously applied this Court's decision in *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express, supra.* The correct classification of these commodities in relation to Section 203 (b) (6) is of great practical importance to shippers and carriers, and to the Commission in the administration of the Interstate Commerce Act.

In the *East Texas* case, in holding that fresh and frozen dressed poultry were exempt agricultural commodities under Section 203 (b) (6), rather than "manufactured products thereof," this court stated that the exemption for agricultural commodities is "lost not by incidental or preliminary processing but by manufacturing" (351 U. S. at 52). Recognizing the difficulty of drawing a practical line between processing and manufacturing, this Court concluded that "where the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of Section 203 (b) (6)" (351 U. S. at 54).

The "continuing substantial identity" test thus laid down by this Court for distinguishing "agricultural commodities" from "manufactured products thereof," is not substantially different from the Commission's definition of "agricultural commodities", as "agricultural commodities in their natural state and those which, as a result of treat-

ing or processing, have not acquired new forms, qualities, properties, or combinations" (52 M. C. C. at 521). However, the decision made it clear that a majority of this Court believed that to some extent the Commission had given too narrow a scope to the agricultural commodity exemption in Section 203 (b) (6).

We submit that the decision below misapplies this Court's decision in the *East Texas* case and, in so doing, has both endangered the Congressional objective of creating a healthy system of public carriers and ignored the evidentiary record supporting the Commission's action.

This Court has repeatedly recognized that the purpose of Congress in enacting the Motor Carrier Act of 1935 (now Part II of the Interstate Commerce Act) was to provide a system of healthy and responsible motor common and contract carriers—through regulation of entry into interstate motor transportation, rates, safety, and insurance. *American Trucking Assn's* v. *United States*, 344 U. S. 298, 312. In the *East Texas* case, this Court noted that the exemption from economic regulation in Section 203 (b) (6) reflects Congressional "recognition that the price which the farmer obtains for his products is greatly affected by the cost of transporting them to the consuming market in their raw state or after they have become marketable by incidental processing" (351 U. S. at 51).

We do not urge that this exemption should be given a grudging or mechanically narrow construction. Rather, we contend that under the National Transportation Policy, Section 203 (b) (6), like the other provisions of the Act, must "be administered and enforced with a view to carrying out [that policy] to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

The decision below thwarts the National Transportation Policy, as well as the more specific purpose of Part II of the Act to promote a strong system of public motor carriers, by extending the exemption of Section 203 (b) (6) to the products of industry. Such undue expansion of the exemption, without demonstrable benefit to farmers, erodes the economic base of the authorized carriers upon whom most shippers—particularly small shippers—are dependent for transportation service.

The court below further erred in giving no weight to the undisputed evidence upon which the Commission based its conclusions as to the commodities here involved. The Commission's

report in *Determination of Exempted Agricultural Commodities, supra*, was issued only after extensive hearings in which evidence was received from many witnesses, including representatives of the Department of Agriculture. Expert witnesses from that Department testified that the fresh and frozen dressed poultry involved in the *East Texas* case were not manufactured products. In sharp contrast, expert witnesses from the Department of Agriculture testified that quick frozen fruits and vegetables, powdered milk, dried egg powder, dried egg yolks, and buttermilk are manufactured products. The Commission's findings are based expressly upon this undisputed testimony. 52 M. C. C. 528–534 (quick frozen fruits and vegetables), 545–547 (dried egg powder and dried egg yolks), and 550–551 (powdered milk and buttermilk).

The Commission found, as to quick frozen fruits and vegetables (52 M. C. C. at 534), that:

> Although no one questions the examiner's conclusion that frozen or quick-frozen fruits and vegetables are manufactured products, in view of certain questions raised respecting other frozen commodities, some discussion of these items will be helpful. The quick freezing of fruits involves the addition of other ingredients, principally sugar or sirup. Since a "combination" results, it follows

> in light of the foregoing definition of "manufacture" that quick-frozen fruits are manufactured products. In the quick freezing of vegetables, the commodities are customarily blanched or scalded prior to freezing, and sometimes ascorbic acid is added, thus enabling the product to be held in that condition until ready for use. * * *

The court below, while noting that "The processing to which the fresh product is subjected, after leaving the farmer's hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated", concluded in effect that this phase of the case was governed by the holding in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W. D. Wash.), affirmed summarily 352 U. S. 884, that the transportation of quick frozen fruits and vegetables is exempt under Section 203 (b) (6).

We submit that the summary affirmance of the *Home Transfer* decision should not preclude this Court from reexamining the status of quick frozen fruits and vegetables in the broader context of the instant case. They involve a processing which is far more than incidental to making them marketable. They are the products of industrial plants rather than of the farm. From 1935 until the *Home Transfer* decision in 1956, their status as manufactured products which could be transported in interstate commerce only

by authorized carriers was unchallenged,[2] and such carriers made large investments in refrigerated equipment upon that assumption. The huge volume of quick frozen fruits and vegetables which is transported in interstate commerce makes the question one of substantial importance to the entire transportation and food industries.

The decision below is clearly erroneous in classifying powdered milk as an exempt agricultural commodity rather than a "manufactured product." The uncontroverted expert testimony before the Commission was to the effect that dehydration results in a manufactured product. Moreover, this holding is inconsistent with the further holding of the court below that condensed milk is a manufactured product not covered by Section 203 (b) (6)—since condensation obviously represents a less drastic process than dehydration. Since, as we are informed, powdered milk is produced in an annual volume of

[2] In the *Home Transfer* case, the Department of Justice joined with the Commission in defending in the district court the Commission's conclusion that quick frozen fruits and vegetables are not exempted agricultural commodities under Section 203 (b) (6). In the instant case, upon remand by this Court and following the district court decision in the *Home Transfer* case, the Departments of Justice and Agriculture filed in the court below a joint brief stating with respect to frozen fruits and vegetables that "In deference to [the *Home Transfer*] decision the United States and the Secretary of Agriculture recede from their previously expressed endorsement of the Commission's contrary findings and conclusion."

3 billion pounds, its proper classification as a manufactured product is important for carriers and shippers alike.

For the same reasons, we submit that the decision below is erroneous in holding that dried egg yolks and dried egg powder are exempt agricultural commodities under Section 203 (b) (6).

The court below also held that buttermilk is an exempt agricultural commodity—while simultaneously holding that butter is a manufactured product. Since, we contend, butter clearly is a manufactured product under the "continuing substantial identity" test, it follows that buttermilk also is a manufactured product since both result from the same churning process.[3]

In *Frozen Food Express* v. *United States*, *supra*, this Court recognized the practical importance to carriers and shippers of correct and authoritative interpretation of the agricultural commodity exemption, which led the Commission to institute the *Determination* proceeding and this Court to hold that the Commission's conclusions were reviewable by the courts. We submit that the decision below demonstrates the need for further consideration of the problem by this Court.

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[3] In the court below, the Departments of Justice and Agriculture defended the Commission's determination that powdered milk, dried egg yolks, dried egg powder, and buttermilk are manufactured products.

CONCLUSION

For the reasons stated, we believe that the question presented by this appeal is substantial and is of such public importance as to require plenary consideration, with briefs and oral argument, for its resolution.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,
CHARLIE H. JOHNS, JR.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

JULY 12, 1957.

APPENDIX A

In the

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

December 31, 1956

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge:

The history of this litigation and the issues which it raises are fully reflected in the opinion of this Court on original submission (128 F. Supp. 374) to which reference is here made. Our dismissal of the action on that occasion, on the ground that the challenged order of the Interstate Commerce Commission was one not subject to judicial review, was reversed by the Supreme Court (351 U. S. 40), and the action remanded for consideration on the merits. This requires a re-

view of the action of the Interstate Commerce Commission in classifying the many commodities enumerated in the petition of the Plaintiff, or in the intervening petition of the Secretary of Agriculture, as "agricultural commodities" (in which event under § 303 (b) (6) of Title 49, U. S. C. A., their carriage by a motor carrier is substantially free from I. C. C. regulation and control), or as "manufactured products" of agricultural commodities, in which event they enjoy no such exemption.

The commodities enumerated in Plaintiff's complaint, classification of which we are called upon to review are: slaughtered cattle; fresh meat; meat products; frozen whole eggs; dried egg powder; dried egg yolks; cottage cheese; cream cheese; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; butter; cottonseed meal; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); fruits and vegetables canned; dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk condensed; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen meat; frozen dressed poultry.

Those raised by the petition in intervention of the Secretary of Agriculture are as follows:

frozen milk and cream; cotton linters; chopped hay; seeds; deawned or scarified; redried tobacco leafs [leaves].

Since this action was here before, recent decisions have removed the uncertainty surrounding a number of these commodities. In the related case of *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express* (128 F. Supp. 374 at 379), we considered slaughtered cattle, fresh and frozen meat and meat products to be nonexempt, from which portion of the judgment in that proceeding no appeal was taken. Our holding that fresh and frozen dressed poultry was exempt was affirmed (351 U. S. 49), wherein the Supreme Court announced the so-called "continuing substantial identity" test, quoting from *Anheuser-Busch Assn.* v. *U. S.* (207 U. S. 556 at 562):

> "* * * Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft* v. *Wiegmann*, 121 U. S. 609. There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use'."

and saying

> "At some point processing and manufacturing will merge. But where the commodity retains a continuing substantial identity through the processing stage, we cannot say that it has been 'manufactured' within the meaning of § 203 (b) (6)."

Applying this most recent test, a three-judge District Court of the District of New Jersey in *Consolidated Truck Service, Inc.* v. *U. S.* (144 F. Supp. 814), held that shelled, raw nuts were exempt, and that the incidental processing to which they were subjected, namely, shelling, drying, cleaning, polishing, bleaching, grading, sorting and refrigerating, did not constitute manufacture. And the District Court for the Western District of Washington held frozen fruits and vegetables to be exempt in *Home Transfer and Storage Company* v. *U. S.* (141 F. Supp. 599). This holding was affirmed, without opinion, by the Supreme Court November 5, 1956 (352 U. S. 884).

Prior to this action by the Court, frozen fruits and vegetables had become a particular bone of contention in the prolonged struggle over the extent and scope of the agricultural exemption. There is a heavy volume of motor carrier traffic in this commodity. The processing to which the fresh product is subjected, after leaving the farmers' hands and before appearing in the familiar frozen-food carton on the grocers' shelves, is extensive and complicated. In holding frozen fruits and vegetables to be exempt, the *Home Transfer* case has gone far toward settling the entire controversy in favor of the liberal interpretation of the exemption urged by the farming interests, the Department of Agriculture, and those motor carriers (as the Plaintiff) who seek to avoid I. C. C. control in the carriage of these commodities.

With this background, the following commodities, of agricultural origin, having undergone some

processing but retaining their original identity, we hold exempt: frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled, ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, dewawned or scarified; redried tobacco leaves.

For the reason set forth in our opinion *Frozen Food Express* v. *U. S.* (128 F. Supp. 374 at 379 *et seq.*), we hold to be non-exempt the following: slaughtered cattle, fresh meat, meat products. We likewise hold non-exempt, under the evidence which deals with commercial creamery products, as "manufactured products" of agricultural commodities the following: cottage cheese; cream cheese; butter; cottonseed meal; fruits and vegetables canned; milk condensed. Each of these products has acquired a new identity, with new properties, and is devoted to new and different uses than its original principal ingredient. As result of combination with other constituents, of treatment and processing by varied types of machinery and equipment, a new product has emerged. If the semanticist urges that a can of

peaches or of condensed milk may not properly be described as a "manufactured product," it may well be that these items illustrate the point at which processing merges with manufacturing.

Except to the extent noted above, the determination, classification, and order of the Interstate Commerce Commission holding commodities hereinabove enumerated to be non-exempt are not in accord with law, and the enforcement thereof will be enjoined.

Clerk will notify counsel.

Done at Houston, Texas, this 31st day of December, 1956.

/s/ J. C. HUTCHESON, JR.
Chief Judge, Fifth Circuit.

/s/ BEN C. CONNALLY,
United States District Judge.

/s/ T. M. KENNERLY,
United States District Judge.

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[1] In the *Determination Proceedings* before the Interstate Commerce Commission, no exception was taken to the holding that canned goods were exempt. Here, the United States (through the Department of Justice), the Secretary of Agriculture, the Interstate Commerce Commission and all other Defendants and Intervenors urge that canned goods are non-exempt. Only the plaintiff contends to the contrary.

APPENDIX B

In the

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 8285

FROZEN FOOD EXPRESS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

FINAL JUDGMENT

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on the 13th day of September 1956, before a duly constituted Three-Judge District Court, convened pursuant to Sections 2284 and 2321–2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence and the briefs and argument of counsel for the respective parties, and being fully advised in the premises; and having on the 31st day of December, 1956, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion, findings and conclusions, it is hereby

ORDERED, ADJUDGED, and DECREED as follows:

(1) The decision and order of the Interstate Commerce Commission entered April 13, 1951, in a proceeding docketed by the Commission as No. MC–C–968, *Determination of Exempted Agricultural Commodities,* is enjoined, suspended, annulled, vacated and set aside insofar as the Commission found and concluded that frozen whole eggs; dried egg powder; dried egg yolks; clean rice; rice bean; rice polish; pasteurized milk; fresh cut up vegetables in cellophane bags; fresh vegetables, washed, cleaned and packaged in cellophane bags or boxes; fruits or vegetables (quick frozen); shelled peanuts; peanuts shelled ground; killed and picked poultry (although not drawn); rolled barley; cottonseed hulls; beans (packaged, dried artificially or packed in small containers for retail trade); dried fruits (dried mechanically or artificially); peaches peeled, pitted and placed in cold storage in unsealed containers; strawberries canned in syrup in unsealed containers and placed in cold storage; milk, skimmed, vitamin D; milk, powdered; buttermilk; feathers; frozen milk and cream; cotton linters; chopped hay; seeds, dewawned or scarified; and redried tobacco leaves are not agricultural commodities within the meaning of Section 203 (b) (6) of the Interstate Commerce Act [49 U. S. C. 303 (b) (6)]; and

(2) All other relief sought by the plaintiffs herein, including the Secretary of Agriculture as

Intervening Plaintiff, be and the same is hereby denied.

This the 14th day of March, 1957.

J. C. HUTCHESON,
Chief Judge, United States Court of Appeals for the Fifth Circuit.

BEN C. CONNALLY,
United States District Judge.

T. M. KENNERLY,
United States District Judge.

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